

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against JOSEPH MICHAEL CAPISTRANT,
a Minnesota Attorney,
Registration No. 187112.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

Upon the approval of a Lawyers Professional Responsibility Board Panel Chair, the Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition pursuant to Rules 10(d) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 16, 1987. Respondent currently practices law in Plymouth, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

Failure to Promptly Return Client Files

1. Denise Hedden operated Specialty Contracting Services, Inc., d/b/a ServiceMaster ("Specialty"), and Randall Hedden operated Superior Construction Services, Inc. ("Superior").
2. Respondent represented Specialty from 1984 through October 2012 and represented Superior from its inception in 1993 through October 2012. Respondent represented both businesses in legal matters in both Minnesota and Wisconsin, primarily in the area of construction litigation, though respondent also performed

corporate, employment and other legal tasks for complainants. At all times relevant, respondent was in possession of the Heddens' legal and other files necessary for the performance of his duties.

3. On or about October 15, 2012, the Heddens terminated their attorney-client relationships with respondent and retained attorney Craig A.B. Freeman as new counsel. Respondent's last day was on or before November 2, 2012. Respondent turned over some, but not all, of complainants' files to Mr. Freeman.

4. By email dated November 30, 2012, Mr. Freeman identified four files as missing for respondent, and requested that respondent determine if he still possessed them. Respondent did not respond to Mr. Freeman's November 30, 2012, email and failed to produce the files.

5. By email to respondent dated December 5, 2012, Mr. Freeman followed-up the November 30, 2012, email request regarding the missing files and also identified another missing file. Respondent did not respond to Mr. Freeman's December 5, 2012, email and failed to produce the files.

6. On December 11, 2012, Jessica Christensen, a paralegal in Mr. Freeman's firm, wrote to respondent requesting a response regarding the missing files. Respondent did not respond to Ms. Christensen's December 11, 2012, letter and failed to produce the files.

7. On January 25, 2013, Mr. Freeman again wrote to respondent expressing his need for the clients' files. Mr. Freeman further stated that respondent's failure to provide the files was causing serious issues with resolving the clients' legal matters, and requested that respondent contact him to arrange for the transfer of the files. Respondent did not respond to Mr. Freeman's January 25, 2013, letter and failed to produce complainants' files.

8. On February 4, 2013, Mr. Freeman once again wrote to respondent regarding the missing files. Mr. Freeman identified respondent's nearly four-month

lack of communication, renewed the Heddens' demand for the return of all files and documents in respondent's possession, and again requested that respondent contact him to arrange for the transfer of complainants' files. Mr. Freeman also noted that respondent had failed to respond to at least one direct request from Randall Hedden for a file and had failed to respond to another attorney's request for information pertaining to a matter respondent had previously handled for the Heddens. Finally, Mr. Freeman requested that respondent provide the files on or before February 15, 2013. Respondent did not respond to Mr. Freeman's February 4, 2013, letter or email, and failed to produce the files.

9. On February 18, 2013, the Heddens submitted written complaints to the Director's Office regarding respondent's failure to return their files.

10. On or about April 25, 2013, respondent returned the Heddens' missing files by leaving them outside the door to Freeman's office after hours.

11. Respondent's conduct violated Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).

SECOND COUNT

Failure to Communicate and Failure to Act Diligently

12. In July 2009, respondent filed a construction lien in Wisconsin on behalf of Superior. The parties to the lawsuit entered into a settlement agreement. After there was a default on the settlement agreement, in August 2010 respondent commenced a foreclosure action in Sauk County Wisconsin Court.

13. The parties again reached a settlement agreement which respondent was to finalize.

14. On June 8, 2010, respondent's Wisconsin law license was suspended for failure to comply with continuing legal education reporting requirements. Respondent did not disclose to Superior the fact that his license to practice law in Wisconsin had been suspended. Respondent's license was not reinstated until June 2011.

15. As a result of the suspension of his Wisconsin license, respondent failed to finalize the settlement agreement in the construction lien matter and the court dismissed the matter due to a failure to prosecute.

16. Respondent took no further action to protect his client's construction lien.

17. Thereafter, in early 2012, Superior was served a summons and complaint regarding the property which was the subject to Superior's construction lien.

18. Respondent did not respond to the summons and complaint. Superior was defaulted due to the lack of an answer and judgment was entered against Superior. Superior, through new counsel, moved to vacate the judgment.

19. On February 13, 2013, the Wisconsin court issued a memorandum decision declining to vacate the default judgment, finding in part that: counsel for the opposing party sent respondent two letters, two emails and a voice mail prior to filing suit against Superior; respondent admitted he had received one letter from opposing counsel and chose to ignore it; respondent had seen the summons and complaint and took no action to instruct Superior with regard to the matter; and that respondent's failure to act did not demonstrate excusable neglect.

20. Respondent's conduct violated Rules 20:1.3 and 20:8.4(d), Wisconsin Rules of Professional Conduct (WRPC).

21. Respondent's conduct violated Rules 20:1.4 and 20:8.4(c) and (d), WRPC.

THIRD COUNT

Non-Cooperation

22. During the course of reviewing the February 18, 2013, complaint, the Director's Office became aware that respondent's Minnesota law license had been suspended for nonpayment of lawyer registration fees as of January 1, 2013.

23. On February 25, 2013, the Director's Office wrote to respondent notifying him of the suspension, advising respondent that practice while suspended for nonpayment of lawyer registration fees is unauthorized practice of law and a violation

of Rule 5.5(a), MRPC, and requesting that within 14 days respondent submit to the Director proof of payment of the lawyer registration fee and penalty. The Director's Office also requested an affidavit concerning respondent's practice of law since January 1, 2013.

24. Respondent did not respond to the February 25, 2013, letter from the Director's Office, did not provide the requested information, and failed to contact the Director's Office to request an extension of time in which to respond.

25. On March 19, 2013, the Director's Office again wrote to respondent regarding the nonpayment of lawyer registration fees, and the provision of an affidavit. The Director's Office requested a response within five days. Respondent did not respond to the March 19, 2013, letter from the Director's Office, did not provide the requested information, and failed to contact the Director's Office to request an extension of time in which to respond.

26. On March 4, 2013, the Director's Office sent to respondent a notice of investigation along with a copy of the complaint submitted by complainants. Although a response was due to the assigned District Ethics Committee (DEC) investigator within 14 days of the March 4, 2013, notice of investigation, respondent did not respond. Respondent did not contact the DEC investigator to request an extension.

27. On March 19, 2013, the DEC investigator wrote to respondent reminding him of his obligation to submit a written response to the complaint, and requesting respondent do so before the close of business on March 27, 2013. Respondent did not respond to the complaint and failed to contact the DEC investigator to request an extension of time in which to respond.

28. On April 1, 2013, the DEC investigator left a telephone message for respondent at the telephone number listed on respondent's Web site, again requesting the submission of a written response to the complaint before the close of business on

April 5, 2013. Respondent did not respond to the complaint and failed to contact the DEC investigator to request an extension of time in which to respond.

29. On April 8, 2013, the DEC investigator again wrote to respondent reminding him of his obligation to comply with reasonable requests for information, informing respondent that failure to cooperate with a disciplinary investigation could be independent grounds for discipline, and requesting a written response before the close of business on April 15, 2013. Respondent did not respond to the complaint and failed to contact the DEC investigator to request an extension of time in which to respond.

30. On May 20, 2013, the Director's Office wrote to respondent regarding the DEC investigation and invited respondent to provide a written response to the DEC investigator's report within two weeks.

31. On June 4, 2013, respondent contacted the Director by telephone to request a meeting and additional time in which to respond. A meeting was scheduled for June 6, 2013. Respondent was reminded that a written response to the complaint was still required.

32. On June 6, 2013, the Director met with respondent. During the course of the meeting respondent provided a document indicating that he had delivered complainants' files to Mr. Freeman on April 25, 2013. Respondent also agreed to provide, within two weeks, a response to the complaint, an affidavit regarding his law practice while fee-suspended, copies of his counseling records, and a copy of an affidavit filed with regard to a court proceeding discussed during the meeting with the Director's Office.

33. On June 20, 2013, respondent wrote to the Director's Office requesting a two-week extension of the time in which to respond to the complaint and stating that he was "in the process" of locating his counseling records. Along with the letter, respondent provided an affidavit regarding his law practice while fee-suspended and

two affidavits relating to the court proceeding discussed during the June 6, 2013, meeting with the Director's Office.

34. The Director's Office left a telephone message on June 24, 2013, granting respondent the requested two-week extension. Respondent did not provide a response to the complaint or provide his counseling records by the extended deadline, and failed to contact the Director's Office to request an extension of the time in which to do so.

35. On August 8, 2013, the Director's Office sent respondent a letter advising respondent that a response to the complaint and respondent's counseling records still had not been received. Respondent was asked to provide the requested information immediately.

36. On September 11, 2013, having not received the requested information from respondent, the Director's Office wrote to respondent reminding respondent of his obligation to produce information, identifying his deficiencies along those lines, and directing respondent to appear at a meeting in the Director's Office on September 19, 2013. Respondent was also directed to bring the previously requested information to the meeting. Respondent did not attend the September 19, 2013, meeting, did not produce the requested information, and did not contact the Director to provide an explanation or request that the meeting be rescheduled.

37. On April 22, 2014, the Director's Office served respondent with charges of unprofessional conduct and notified respondent that pursuant to Rule 9(a)(1), RLPR, he was required to answer the charges within fourteen days.

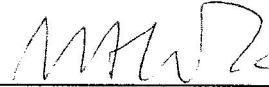
38. Respondent did not provide an answer or otherwise communicate with the Director regarding the charges.

39. Respondent's conduct violated Rules 8.1(b) and 8.4(d), MRPC, and Rule 25(a), RLPR.

WHEREFORE, the Director respectfully prays for an order of this Court suspending respondent or imposing otherwise appropriate discipline, awarding costs


and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: May 19, 2014.



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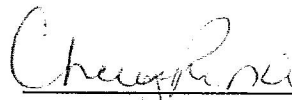
and



JULIE E. BENNETT
SENIOR ASSISTANT DIRECTOR
Attorney No. 289474

This petition is approved for filing pursuant to Rules 10(d) and 12(a), RLPR, by the undersigned Panel Chair.

Dated: 5/28, 2014.



CHERYL M. PRINCE
PANEL CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD